82950-1

Supreme Court No. 82950-1

SUPREME COURT OF THE STATE OF WASHINGTON

CHERYL FORBES,

Respondent/Cross-Appellant,

v.

AMERICAN BUILDING MAINTENANCE COMPANY WEST; ABM JANITORIAL SERVICES; ABM INDUSTRIES INC.,

Defendants,

and

MARY SCHULTZ,
Appellant/Cross-Respondent

REPLY TO SCHULTZ' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Ms. Schultz' Answer raises new (and collateral) issues that warrant a reply under RAP 13.4(d).

II. SUMMARY OF REPLY

The fact that Ms. Schultz achieved an excellent result for her client at trial has never been in dispute. But elevating the exemplary result (and "trial know-how") above the ethical and fiduciary duties owed to a client is contrary to established case law and public policy.

Washington lawyers are subject to ethical and fiduciary restraints, which serve to ensure that the interests of the client are advanced in the litigation. This case presents a situation where the attorney advanced her own pecuniary interests over those of her client. The appeal proceeding centers on the trial court's failure to consider Ms. Schultz' numerous ethical and fiduciary violations in determining what would be a reasonable fee for her services.

Foundational to the trial court's error was its acceptance of Ms. Schultz' argument that because this is not a disciplinary proceeding, the charges of ethical misconduct and ethical violations are irrelevant. However, Washington Supreme Court precedence is clear that a trial court must consider such issues when assessing the reasonableness of attorneys' fees. The trial court's refusal to engage in this process was error.

In an effort to obscure her inappropriate behavior, Ms. Schultz presents a misleading picture of the facts, and puts forth arguments without any citation to the record. For instance, Ms. Schultz expects this Court to believe that her refusal to submit Ms. Forbes settlement counteroffer was nothing more than "casting a fly onto the surface." While creative (and ever-evolving), Ms. Schultz' explanation defies common sense and is completely contrary to the facts. Ms. Schultz' July 29, 2005 email speaks for itself. Ms. Schultz stated:

> **Per our contract, my fees are already earned at 44% of the judgment I received for you, plus prevailing party fees, plus fees on appeal.** You may agree to compromise the claim, but I am not prepared to compromise an **already earned fee** under the conditions of dispute with you. The investment I have made on your behalf is substantial.
>
> **The contract also gives me the authority to settle or compromise the claims**, so long as I submit the compromise to you. Two things result.
> **1) Even though I am not required to obtain your agreement on the counter, I am trying to work with you on it. 2) Given your comment below, until and unless we reach some written agreement on distribution, I will require the earned 44% on the entire amount, plus prevailing party fees, from any settlement that is submitted.**
>
> You may email me your proposal as to the fee split and percentage from any proposed counter, and **if we reach an agreement**, I will put it in writing, you can sign, and we can send a counter.

(CP 1043.) How this e-mail response can be seen as "casting a fly" is beyond comprehension. There was no request for discussion by Ms.

Schultz or suggestion that Ms. Forbes' directive to submit a counteroffer was part of a grand conspiracy. Put simply, there was a request by the client to submit an counteroffer followed by Ms. Schultz' threat to hold the settlement process hostage until Ms. Forbes agreed to compromise her fee dispute. This was as blatant as it was inexcusable.

Ms. Schultz also misrepresents the circumstances surrounding the deposit into the Court Registry. Without any facts to support her version of the events, Ms. Schultz puts forth an argument without any citation to the record. (See Schultz' Answer at 14.) In reality, ABM deposited the full amount of Ms. Schultz' claimed lien, which was more than Ms. Schultz was ultimately awarded by the trial court, into the Registry of the Court. This was done at Ms. Schultz insistence. (CP 487-89, 499.) To claim that it was anything less is a factual misrepresentation designed to mislead this Court.

Lastly, Ms. Schultz misrepresents the Court of Appeal's opinion. The Court of Appeals did not conclude that the Satisfaction of Judgment controls the amount of the settlement, as claimed by Mary Schultz. Rather, as explained in Ms. Forbes' Petition, the Court of Appeals mistakenly concluded that the amount listed in the Satisfaction of Judgment was the amount actually received by Ms. Forbes in settlement. The Court of Appeals arrived at this mistaken conclusion by overlooking the fact that there was evidence of the settlement amount and a specific finding of fact on the issue. The Court of Appeals did not make any

comments on the credibility of the evidence or the lack of support for the finding. Mary Schultz' argument to the contrary is without merit.

Ms. Schultz wants this Court to believe that because she never received "proof" as to what Ms. Forbes ultimately received, the amount found by the trial court was not correct. Ms. Schultz provides no support for this proposition. Ms. Forbes voluntarily produced a copy of the Settlement Agreement she executed with ABM and testified, at trial, that she received $5 million dollars in settlement. (CP 1947; RP 364.) There was NO evidence presented at trial to contradict this version of the facts. In fact, Ms. Schultz conceded that the amount of the settlement was irrelevant. (RP 703.) Mary Schultz knows exactly how much Cheryl Forbes received in settlement from ABM. Mary Schultz currently works as a consultant for ABM. If she had any questions, she could simply ask ABM. She has seen the settlement agreement, both redacted and unredacted. There is no dispute that Ms. Forbes only received $5 million and RCW 4.56.100 has no bearing on the amount received in settlement. The only issue that remains is correcting the Court of Appeals' mistaken (and unfounded) belief as to the amount of the settlement.

III. REPLY TO SCHULTZ' ANSWER

A. Ms. Forbes' Challenge to the Court of Appeals Mistaken Determination of the Amount Received in Settlement is Properly Before this Court and Sanctions are Not Warranted.

Ms. Schultz argument against considering the Court of Appeals mistaken determination of the amount of Ms. Forbes' settlement is misplaced. There should be no dispute that Ms. Forbes only received $5 million dollars in settlement from ABM. (CP 1947; A36-A39.) This fact was properly found by the trial court and adequately supported by Ms. Forbes' testimony and the evidence produced at trial. (CP 1810; RP 364; CP 930, 1048, 1947.)

After Ms. Forbes' moved the Court of Appeals to reconsider its error, Ms. Schultz filed a Statement of Additional Authorities that contained impermissible argument in violation of RAP 10.8. (filed 2/17/09). In response to Ms. Schultz' improper filing, which essentially called Ms. Forbes' credibility into question, Ms. Forbes presented an Objection. (filed 2/20/09). Attached to that Objection was an unredacted copy of the Ms. Forbes' Settlement Agreement with ABM. Id. This was done to counter the inflammatory accusations leveled against Ms. Forbes. Ms. Schultz moved to strike the unredacted Settlement Agreement from the record. (filed 2/23/09). However, the Court of Appeals did not grant, or – presumably – even consider, Ms. Schultz' Motion and the document remains in the Court of Appeals file on this matter.

The simple fact of the matter is Ms. Schultz's baseless allegation against her client was exposed for what it is: a baseless (and incorrect) allegation to obscure the facts. As a result, Ms. Schultz seems displeased with the fact that she will not be able to feign a lack of knowledge over the complete terms of the Settlement Agreement or the amount received in settlement. Allowing Ms. Schultz' argument to prevail would be a miscarriage of justice.

B. Ms. Schultz' Reliance Upon New Facts to Support Her Answer Does Not Alter the Fact that the Trial Court Failed to Consider the Charges of Ethical Misconduct.

Ms. Schultz' primary response to the issue of her ethical misconduct is that the trial court considered, and then rejected, the ethical violations raised. However, this argument is without merit.

Here, a leading Washington scholar on legal ethics opined that Ms. Schultz' conduct resulted in 35 violations of the RPCs, as well as numerous breaches of fiduciary duty. (CP 865-84.) Despite Ms. Forbes' heavy reliance on Ms. Schultz' ethical violations in this fee dispute case, the trial court failed to consider or even mention any RPC provision, with the sole exception of RPC 1.5. (See CP 1797-1813.) The reason is clear: the trial court accepted Ms. Schultz' argument that ethical violations, breaches of fiduciary duties, and CPA violations were irrelevant in a fee dispute matter.

Not only does the plain text of the trial court's Order belie Ms. Schultz' assertion that the trial court considered the charges of ethical misconduct, the trial court's pre-trial and trial comments on the issue show it accepted Ms. Schultz' position that ethical issues were irrelevant. At a pre-trial hearing, the trial court indicated its strong inclination not to consider charges of ethical misconduct. During trial, Ms. Schultz' attorney vigorously and continually argued that RPC 1.5was the ***only*** RPC at issue and that all other RPCs were irrelevant to the proceedings, even going as far as objecting to Ms. Forbes' opening argument when the ethical issues were raised. (RP 47.)

Likewise, the trial court stated "the narrow issue before me is the reasonableness of the fee" which "are those isolated factors and collateral and related factors that go to those that are outlined in 1.5." (RP 239-40.) The trial court went on to state that it did not "believe that the conduct goes to the reasonableness of the fees[,]" and concluded that "[t]he things I factor in on the reasonableness issues are the 1.5." (RP 240.)

The trial court's Order evidences that it failed to consider the charges of ethical misconduct, but rather followed the request of Ms. Schultz and her counsel to not consider such charges as they were beyond the jurisdiction of the court. That the many ethical issues alleged by Cheryl Forbes were completely ignored by the trial court in its ruling further reflects the trial court's erroneous holding that ethical issues were not germane to this dispute. (See RP 240.) For instance, Ms. Schultz' former office manager, who Ms. Schultz considered to be extremely

truthful, testified about a particularly troubling ethical violation. Ms. Duffy testified that:

> **In compiling the cost and fee bill, Mary Schultz instructed me to, among other things, increase the hourly rates of certain timekeepers on the Cost Bill we were preparing to submit to the Court.**
>
> **What is more, Mary Schultz instructed me to change certain items billed as "no charge" to actual billings for submittal to the Court.**

(CP 2047.) (emphasis added). Ms. Duffy also testified that no one explained the November 2002 contract with Ms. Forbes and when Ms. Forbes had questions regarding the November 2002 contract she was told that there was no negotiation and she had to sign the document. (CP 2048; CP 917.) This testimony was uncontroverted at trial, yet was never mentioned by the trial court in its ruling.

Likewise, Colleen Myers, Ms. Forbes co-Plaintiff in the underlying trial, testified that Ms. Schultz attempted to influence her testimony in this matter. In particular, Ms. Myers testified concerning a conversation with Ms. Schultz:

> **Mary Schultz also said that she would make it worth my while if I agreed to help her in this dispute with Cheryl Forbes. I interpreted Ms. Schultz's comments to mean that she was willing to pay me money in connection with testimony that supported her side of the story.**

(CP 2059.) (emphasis added). This testimony went undisputed by Ms. Schultz. However, it too was never mentioned by the trial court, although

the trial court did generically reference Ms. Schultz' inability to act in accordance with her professional mandate. (CP 1807, 1808.)

Ms. Schultz' reliance on the declaration of David Boerner is perplexing. Professor Boerner's declaration was submitted in support of Ms. Schultz' argument that the charges of ethical misconduct were not relevant to the determination of the reasonableness of the fees. In fact, to support his position, which is contrary to established supreme court precedent, Mr. Boerner concluded that "Professor Strait's opinions are focused primarily on issues where are not before this court in this reasonableness proceeding." (CP 1130.) That is, Professor Boerner asserts that the alleged "violations of Washington's Rules of Professional Conduct, of an attorney's ethical and fiduciary duties to her client, Cheryl Forbes[,]" were "totally extraneous" and had no bearing on the determination of a reasonable fee because it was "not a disciplinary proceeding[.]" (CP 1130.)

In further support of her mistaken belief that the trial court considered her ethical misconduct, Ms. Schultz put forth an array of irrelevant facts and misstatements of the record. Chief among the "facts" put forth by Ms. Schultz were various comments made by the trial court. Ms. Schultz' Answer mistakenly identifies several musings made by the trial court as findings. These comments were not denominated as findings of fact *or* conclusions of law. Rather, the trial court made various "deductions" which were superfluous to the actual findings of fact and

conclusions of law. What is more, many of the trial trial's deductions were unsupported (and indeed unsupportable) by the facts and record.

The trial court made a total of sixty-six (66) findings of fact. (CP 1798-1806, at ¶¶ 1-66.) These findings are specifically denominated as "Findings of Fact" on the second page of the trial court's Amended Order. (CP 1798.) Ms. Forbes is not challenging any of these express findings made by the trial court.

In addition to its "Findings of Fact" and "Conclusions of Law," the trial court made various deductions, which were neither findings of fact nor conclusions of law. As explained above, the trial court's Finding of Fact on found on pages 2-10 of the Amended Order. (See CP 1798-1806.) The trial court's "Conclusions of Law" are found on pages 13-16 of the Amended Order. (See CP 1809-1812.) Sandwiched in between the trial court's "Findings of Fact" and "Conclusions of Law" are various musings and commentary made by the trial court.

The trial court's musings are not findings and were not intended to be findings of fact. Indeed, the trial court explicitly offset these musings, by stating: "***The court deduces the following from the preceding Findings of Fact*[.]" (CP 1806) (emphasis added). The trial court's "deductions" are found on pages 10-13. (CP 1806, at ¶¶ 67-81.) Not only did the trial court make a point to distinguish its "deductions" from the preceding Findings of Fact and its Conclusions of Law, the actual musings themselves indicate that they were mere commentary, which must disregarded as surplusage. Morris v. Rosenberg, 64 Wn.2d 404, 409, 391

P.2d 975 (1964) (finding that commentary by the court is mere surplusage).

As explained by Washington case law, "[a] finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." State v. Williams, 96 Wn.2d 215, 634 P.2d 868 (1981). Here, the trial court commented that: "Ms. Forbes . . . engaged in *suspicious conduct* . . . as evidenced by her contact with attorneys at Lukins & Annis[;]" "was using Lukins & Annis in "*suspicious ways*."; her firing of Ms. Schultz was "*possibly* calculated"); and "s*ome would say* [Ms. Forbes] deliberately fired Ms. Schultz to maximize [her] share of the generous verdict."). (CP 1807-08, at ¶¶ 73, 77, 78.) This says nothing of the same type of observations against Ms. Schultz as acting unprofessionally and in an inappropriate and unjustified manner. (See CP 1808, at ¶¶ 73, 77.)

Phrases such as "possibly calculated," or "some would say" are speculative observations or commentary and not findings of fact made by the preponderance of the evidence. As such, the trial court's musings and commentary are superfluous to both the trial court's findings and its conclusions of law and, hence, irrelevant on appeal. See Concerned Coupeville Citizens, v. Coupeville, 62 Wn. App. 408, 413, 814 P.2d 243 (1991) ("A litigant need not assign error to superfluous findings."). Since the above-referenced musings are not findings of fact, they need not be appealed as such, and are irrelevant to the issues on appeal. However, it is

worth noting, for this Court, that there is no evidence to support various "deductions" made by the trial court.

For instance, the trial court's comment that Ms. Forbes engaged in suspicious conduct as evidenced by her contact with attorneys at Lukins & Annis lacks evidentiary support and is pure speculation. The ***only evidence*** of communication between Lukins & Annis and Ms. Forbes related to a one-page privilege log identifying the parties present, the type of contact, the date of the contact, and the length of communication. (Exhibit I-307; RP 23.) The substance of the communications between Ms. Forbes and Lukins & Annis was privileged, so neither party offered evidence about what was discussed during these meetings. As nothing could be "deduced" solely from the fact Ms. Forbes had discussions with another attorney, she objected to evidence relating to the fact of these communications (See RP 66-67.) Nonetheless, the evidence was admitted over these pre-trial objections and used at trial to infer improper conduct. It was entirely unwarranted for the trial court to speculate something "suspicious" occurred merely because contact was made between Ms. Forbes and a Lukins & Annis attorney.[1]

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[1] Notably, Ms. Forbes offered to conditionally waive the attorney-client privilege leading up to the date of Ms. Schultz' termination in order to rebut the conspiracy theory. However, Ms. Schultz, through her counsel, refused to stipulate to a conditional waiver of the attorney-client privilege. Because Ms. Forbes did not want to risk a general waiver of all attorney-client communications, she could not explain what was discussed with Lukins & Annis attorneys before she fired Ms. Schultz. Suffice it to say, Ms. Schultz' refusal to allow Ms. Forbes to conditionally waive the privilege for communications with Lukins & Annis before she was

Additionally, the trial court's comment that firing Ms. Schultz was "possibly calculated" and certainly unwarranted is not a finding.[2] It is theoretical observation and, as such, it was error for the trial court to base its conclusions on it. The trial court also stated that while the facts never did clearly establish Lukins & Annis was involved in any specific unethical conduct, Ms. Forbes was using the firm in suspicious ways. (CP 1808.) Again, other than evidence that Ms. Forbes spoke to Lukins & Annis attorneys prior to terminating Ms. Schultz, which was never in dispute, there was no evidence that Ms. Forbes' contact was improper. The inference presumably drawn by the trial court was wholly speculative and merely an endorsement of the argument made by Ms. Schultz throughout trial with no evidentiary support.

At the Court of Appeals level, Ms. Forbes challenged these "deductions" as not being supported by substantial evidence. Since the Court of Appeals made no comment on the "deductions" being supported or not supported by the record, it is safe to assume that they were considered superfluous and disregarded. What is more, these "musings"

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terminated, while preserving the privilege for post-termination communications, shows Ms. Schultz was not interested in the truth about Ms. Forbes' contact with Lukins & Annis, but wanted to engage in "cloak and dagger" speculation about a scheme to deprive her of her "earned" fee. The fact that the trial court appears to have accepted this theory, at least in part, was error.

[2] What makes these comments additionally perplexing is that they are inconsistent with the trial court's holding that Ms. Schultz' email to Ms. Forbes on Friday, July 29, 2005, was not justified.

have no bearing on whether the trial court considered the charges of ethical misconduct against Ms. Schultz.

C. A Satisfaction of Judgment is Not an Affirmation of the Amount Received in Settlement.

The Court of Appeals did not conclude that the Satisfaction of Judgment controls the amount of the settlement, as claimed by Mary Schultz. Rather, as explained in Ms. Forbes' Petition, the Court of Appeals mistakenly concluded that the amount listed in the Satisfaction of Judgment was the amount actually received by Ms. Forbes in settlement. Forbes v. American Bldg. Maintenance Co. West, 148 Wn. App. 273, 290, 198 P.3d 1042 (2009). The Court of Appeals arrived at this mistaken conclusion by overlooking the fact that there was evidence of the settlement amount and a specific finding of fact on the issue. See id. The Court of Appeals did not make any comments on the credibility of the evidence or the lack of support for the finding. See id. Mary Schultz' argument to the contrary is without merit.

Ms. Forbes received a total of $5 million in settlement with ABM. (RP 346; CP 1947; A36-39.) There should be no dispute that Ms. Forbes only received $5 million and RCW 4.56.100 has no bearing on the amount received in settlement. Rather, RCW 4.56.100 details the procedural requirements for a satisfaction of judgment. The only issue that remains here is correcting the Court of Appeals' mistaken (and unfounded) belief as to the amount of the settlement. This issue is adequately addressed in

Ms. Forbes' Petition for Review and will not be repeated here per RAP 13.4(d).

IV. CONCLUSION

For the reasons stated herein, this Court should accept review of the issues raised in Ms. Forbes' Petition for Review.

RESPECTFULLY SUBMITTED this 11th day of May, 2009.

LUKINS & ANNIS, P.S.

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of May, 2009, I caused to be served a true and correct copy of the foregoing ~~by the method~~ indicated below, and addressed to all counsel of record as follows:

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